

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF AND APPENDIX
FOR APPELLANT**

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

UNITED STATES
COURT OF APPEALS FOR
DISTRICT OF COLUMBIA

No. 8076

878
MAY 20 1942
Joseph W. Stewart

SAMUEL B. JOHNSTON, *Appellant,*

CLERK

v.

BOARD OF DENTAL EXAMINERS, D. C., *et al.,*
Appellees.

**Appeal from the District Court of the United States
for the District of Columbia.**

ALVIN L. NEWMYER,
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SUBJECT INDEX.

	Page
Jurisdictional Statement	1
Statement of Case	2
Statement of Points	7
Summary of Argument	7
Argument	
I. Section 11 (d) of the Act of July 2, 1940, violates the due process clause of the Fifth Amendment	8
II. The prohibitions contained in the Act of July 2, 1940, violate the due process clause of the Fifth Amendment because of vagueness and indefi- niteness	14
III. The regulations promulgated by the Board are invalid	17
Conclusion	19

INDEX OF CASES.

Chenoweth v. State Medical Examiners, 57 Colo. 74, 141 P. 132	15
Dr. Bloom Dentist v. Cruise, 259 N. Y. 358, 182 N. E. 161, appeal dismissed, 288 U. S. 588, 77 L. Ed. 967.	12
Douglas v. Noble, 261 U. S. 165, 67 L. Ed. 590.....	12
Graves v. Minnesota, 272 U. S. 425, 71 L. Ed. 331.....	12
Green v. Blanchard, 138 Ark. 137, 211 S. W. 375.....	14
Hewitt v. State Medical Examiners, 148 Calif. 590, 84 P. 39	16
Semler v. Oregon State Board of Dental Examiners, 294 U. S. 608, 79 L. Ed. 1086	12
Smith v. Texas, 233 U. S. 630, 58 L. Ed. 1129.....	13
Weaver v. Palmer Bros. Co., 270 U. S. 402, 70 L. Ed. 654	13

STATUTES AND REGULATIONS.

Act of Congress of July 2, 1940, Public No. 708, 76th Congress.	2
D. C. Code (1940), Section 17-101	2
Regulations adopted by the Board of Dental Examiners of the District of Columbia.....	3

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 8076.

SAMUEL B. JOHNSTON, *Appellant*,

v.

BOARD OF DENTAL EXAMINERS, D. C., *et al.*,
Appellees.

BRIEF ON BEHALF OF APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal by Samuel B. Johnston, appellant, plaintiff below, from a judgment dismissing his complaint filed in the District Court of the United States for the District of Columbia against the Board of Dental Examiners of the District of Columbia and the members constituting said Board, the appellees herein, for a declaratory judgment and for injunctive relief against the enforcement of certain regulations adopted by said board controlling the practice of dentistry in the District of Columbia. The court made certain findings of fact and conclusions of law based upon the plaintiff's case and thereupon granted the appellees' motion to dismiss. (R. 16)

The jurisdiction of this court is based on Section 17-101 of the D. C. Code (1940).

References in this brief to the printed appendix are made by the symbol "(R.)." References to the stenographic transcript of the testimony produced in the court below on behalf of the appellant are made to the pages of the original record in this court by the symbol "(S. T.)," for "Stenographic Transcript." The page numbers referred to after the letters "(S. T.)" are to the pages as originally numbered by the reporter, as distinguished from the page numbers assigned after the record was compiled by the clerk of the court below.

STATEMENT OF CASE.

The appellant, a practicing dentist in the District of Columbia for approximately twenty-five years, filed a Complaint in the court below against the Board of Dental Examiners, D. C. and the members thereof for a declaratory judgment and for injunctive relief against the enforcement against the appellant of certain rules and regulations promulgated by said Board of Dental Examiners for the control of the practice of dentistry in the District of Columbia, which regulations were promulgated by said Board pursuant to Section 11, paragraph (h), sub-division (3) of the Act of Congress of July 2, 1940, Public No. 708, 76th Congress. The constitutionality of said Act was also challenged in the Complaint. (R. 5, 7)

By Section 11 (d) of said Act, a dentist is prohibited from engaging in certain activities. Insofar as such prohibition concerns the case at bar, it prohibits advertising prices for professional services; advertising by means of "*large*" display, "*glaring*" light signs, or signs containing as a part thereof the representation of a tooth, teeth, bridgework, or any part of the human head; advertising painless dentistry; and advertising any free dental examination.

Said Act recites that the license of a practicing dentist in the District of Columbia may be revoked if such dentist

is found by the District Court of the United States for the District of Columbia to be guilty of "unprofessional conduct."

Section 12 of said Act provides that an action for revocation may be maintained by said Board by filing a petition in the District Court of the United States for the District of Columbia in the name of said Board.

Paragraph (h) of said Act defines "unprofessional conduct" as follows:

"The following acts on the part of a licensed dentist are hereby declared to constitute unprofessional conduct:

"(1) Practicing while his license is suspended.

"(2) Willfully deceiving or attempting to deceive the Board or their agents with reference to any matter under investigation by the Board.

"(3) Advertising by any medium other than the carrying or publishing of a modest professional card or the display of a modest window or street sign at the licensee's office, which professional card or window or street sign shall display only the name, address, profession, office hours, telephone connections, and, if his practice is so limited, his specialty: *Provided*, That in case of announcement of change of address or the starting of practice, the usual size card of announcement may be used. The size of said cards or signs shall be designated by the Board."

"(4) Practicing dentistry under a false or assumed name or corporate name other than a partnership name containing the names of the partners, or any name except his full proper name which shall be the name used in his license granted by the Board.

"(5) Violating this Act or aiding any person to violate this Act or violating or aiding any person to knowingly violate the dental practice act of any State or Territory.

"(6) Practicing in the employment of, or in association with, any person who is practicing in an unlawful or unprofessional manner.

"The foregoing specifications of acts constituting unprofessional conduct shall not be construed as a complete definition of unprofessional conduct nor as authorizing or permitting the performance of other or similar acts not denounced, or as limiting or restricting the said court from holding that other or similar acts also constitute unprofessional conduct."

Thus, the Act declares that a dentist is guilty of unprofessional conduct if he advertises by *any* medium other than by a "*modest*" professional card or by a "*modest*" window or street sign.

Section 1 of said Act empowers the Board of Commissioners of the District of Columbia to appoint a Board of Dental Examiners and Section 2 authorizes the Board to promulgate rules and regulations. Pursuant to said authorization, the Board of Dental Examiners on November 18, 1940, promulgated seven regulations which are set forth in the appendix to this brief. (R. 9)

By Regulation No. 1, the Board provided that a dentist is permitted to display only two signs. Paragraphs (a) and (b) of Regulation No. 1 purport to declare, by implication, the meaning of a "*modest*" sign as stated in the statute.

Regulation No. 2 also relates to the number of signs displayed.

Regulations No. 3 and No. 5 prohibit the insertion in any sign of any information other than that expressly permitted by Section 11 (h) (3) of the statute; namely, the dentist's name, address, profession, office hours, telephone connections and the dentist's specialty, if his practice is limited.

Regulation No. 4 provides that no sign may contain vertical lettering, intermittent illumination or an illuminated border.

Regulation No. 6 defines a "*sign*" within the meaning of the Regulations.

Regulation No. 7 does not prohibit newspaper advertising *per se*, but limits such advertising to a single ad or card not exceeding two and one-quarter inches in width and one

inch in height and limited so that only the information provided for in Section 11 (h) (3) of the statute can be stated therein.

For approximately twenty-five years prior to the enactment of the aforesaid statute, appellant had been a licensed dentist engaged in practice in the District of Columbia. The court found as a fact that he possessed reasonable competency. (R. 14) During his practice in the District of Columbia he had advertised in the local newspapers, spending large sums in doing so, and had for many years maintained four signs, four feet by six feet in size, on which letters four, five and eight inches in height were painted. These signs were located on the building in which his office was located. (R. 14) By continuing to maintain said signs on said building and by continuing to engage in advertising in local newspapers, appellant was threatened with criminal prosecution and with revocation of his license to practice, by virtue of the aforesaid Act of Congress and the aforesaid regulations promulgated by the Board of Dental Examiners.

In order to determine the validity of said Act and regulations, as applied to the activities engaged in by appellant, he filed his complaint below for (1) a declaratory judgment to determine his right to engage in certain of the acts apparently prohibited by the statute and regulations, and (2) for relief against the Board by injunction against the threatened enforcement of the aforesaid regulations. Appellant's position was based on the grounds that (1) said Act of Congress was unconstitutional because (a) it was repugnant to the due process clause of the Fifth Amendment, and (b) it was vague and indefinite in its language and in its delegation of authority to the Board of Dental Examiners; (2) that the regulations promulgated by the Board were invalid on the grounds that (a) neither the statute nor the regulations bore any reasonable or appropriate relation to the protection of public health, and (b) the regulations were indefinite, arbitrary, capricious and were designed to set up a standard of conduct for the pecuniary

advantage of certain individuals engaged in the practice of dentistry to the exclusion of others on grounds having no reasonable relation to the general public interest.

The trial court limited the appellant in his testimony at the trial by peremptorily ruling that the Act was valid and that the court was interested in the taking of testimony only for the purpose of determining whether the size of the signs was reasonable. At page 8 of the stenographic transcript, the trial court made the following statement shortly after the trial began (S. T. 8):

“The Court: I think the act is valid as to its provisions with respect to advertising. My only doubt is as to whether the regulation as to the size of the signs is reasonable.”

Testimony was offered on the following propositions as to which the trial court did not make any findings of fact:

1. The volume of appellant's practice resulting from sign and newspaper advertising enabled him to render proper dental care for persons in the low income group at prices far below the prices of the non-advertising dentists; that the effect thereof was educational in character to persons in such group and was generally protective of the public interests. (R. 3) (S. T. 7)

2. Maintenance of the signs upon the outside of the building in which appellant's office is located and advertising in the newspapers did not impair the high standard of dental treatment rendered by the plaintiff to the public.

3. The signs maintained by the appellant, consisting of four signs four feet by six feet in size with lettering four, five and eight inches in height, were modest in the light of traffic conditions, etc., as contained in paragraph 3 of the Findings of Fact.

The appellees did not introduce evidence at the trial. The court made Findings of Fact and Conclusions of Law at the conclusion of the appellant's case (R. 14, 15) and, thereupon, dismissed the complaint (R. 16).

STATEMENT OF POINTS.

1. The court erred in declaring that Sections 11 (d) and 11 (h) of the Act of July 2, 1940 are constitutional.
2. The court erred in refusing to declare the invalidity of the Regulations promulgated by the Board of Dental Examiners on November 18, 1940.
3. The court erred in not finding as a fact that truthful advertising by the appellant was not repugnant to public health, safety or any general public interest.

SUMMARY OF ARGUMENT.

The Act of July 2, 1940 is vague and indefinite in that Section 11 (d) subjects a dentist to revocation of his license to practice if he advertises by "large display" or "glaring light" signs and because it prohibits him from advertising free dental examination. Newspaper advertising by dentists is not declared to be contrary to the public health or safety. On the contrary, newspaper advertising is permitted by the Regulations. The Regulations of the Board of Dental Examiners limiting the size of signs and newspaper advertisements are arbitrary and unreasonable and bear no reasonable relation to the public health or safety. Insofar as Regulation No. 1 attempts to regulate the number of signs or the size thereof, it is arbitrary and capricious, bears no reasonable relation to the public health and safety and goes beyond the authority delegated by Congress to the Board to designate the "size of said cards or signs." Insofar as the Act of July 2, 1940 and the Regulations prohibit truthful advertising they are unconstitutional and void.

ARGUMENT.**I.****Section 11 (d) of the Act of July 2, 1940, Violates the Due Process Clause of the Fifth Amendment.**

According to the appellant's complaint and the evidence offered in his behalf, it appeared that he had been engaged in the following activities which the court below determined to be within the prohibition of Section 11 (d) of the statute:

(a) Advertising prices for professional services in the local newspapers.

(b) Advertising by four signs on the building where his office is located, each of which signs is four feet by six feet in size with lettering thereon four, five and eight inches in height.

(c) Display of bridgework in a small showcase at the entrance to his office building.

(d) Advertising free dental examination on the building where his office is located and in the newspapers.

(a) Prices.

The testimony of the appellant clearly established that a great part of dental work is in reality mechanical in nature rather than professional and involves the mechanical manufacture of dental plates and the sale thereof after proper fitting to the mouth of a patient. Advertising the price for such work was shown not only to have the effect of increasing the volume of appellant's work but also enabled him to do such work for an amount far less than that charged by the so-called Dental Society dentists who do not engage in advertising. (S. T. 7) Many persons who could not afford dental care at higher rates are thus afforded an opportunity for dental care. The court affirmatively found that appellant is reasonably competent. (R. 15) No evidence was offered by the appellees that might tend to show that the

dental work performed by him is not scientific, well done and equal to that performed by the so-called non-advertising dentists. On the contrary, the underlying tenor of the evidence adduced below, together with the theory of the arguments of counsel for the appellees, was that the appellant's dental work was equal to that of the ordinary practicing dentist. The appellees contended that since the statute prohibited advertising of prices, such prohibition was lawful, irrespective of its relation to the general public health or safety.

If we proceed on the assumption, as we must, that appellant's education, experience and the character of the dental work rendered by him is equal to that of the non-advertising group of dentists, it must necessarily follow that his engagement in advertising for the past twenty-five years can have no deleterious effect on public health or safety. Advertising of prices for dental work does not impair the public health, safety or any general public interest. The economic gain resulting from such advertising is obvious. That gain may enure in part to the appellant. The substance of such gain is absorbed by the general public who accept the offer of appellant's services and are thereby able to obtain adequate and proper dental care at a substantial reduction in cost. Further, although Section 11 (d) does not expressly prohibit newspaper advertising as such and the language is sufficiently general to include all advertising, yet the Board, in adopting Regulation No. 7, expressly permitted newspaper advertising, thereby recognizing that such advertising is not *per se* contrary to the public interest.

Appellant contends that the trial court committed error in dismissing the complaint without first making a finding of fact as to whether advertising of prices by dentists was contrary to the public health or to any general public interest. The existence of an economic benefit to the advertising dentist as a result of advertising, not obtained by the non-advertising dentist, is of no probative force in a determination of the effect of such advertising upon public health or safety.

(b) Building Signs.

Finding of Fact No. 3 states that the corner of Seventh and E Streets, where appellant's office is located, is in an area where heavy traffic passes on both Seventh and E Streets, consisting of buses, street cars and heavy automobile traffic. (R. 15)

The court did not find that the four signs maintained by the appellant upon the outside walls of the building where his office is located were "*large display*" or "*glaring light*" signs, as prohibited by the statute. According to the evidence, appellant has not maintained a lighted sign upon his office building for many years. (S. T. 34) The court did find, however, that the size of letters prescribed by the Board "are readily visible from the street and the signs sufficient in number." (R. 15) Although this finding is not clear, if it means that two signs of the size prescribed by the Board can be seen from the street, there is no finding in regard to appellant's contention that the number and size of the signs maintained upon his office building are also reasonable and visible. It is submitted that the court's finding as to the reasonableness of the size and number of signs for the physical location of appellant's office is not supported by sufficient evidence. It is true that the trial judge did, during the trial, go to the corner of Seventh and E Streets, to look at the signs maintained by the appellant and did observe in court samples of "approved signs" offered by counsel for appellees. Nevertheless, the court did not make any finding that the signs maintained by the appellant were unreasonable in size, although they are concededly larger than the Board's approved sizes. Further, the court does not find that the maintenance of said four signs is repugnant to the public health or to any general public interest.

(c) Display of Bridgework.

Another form of advertising in which the appellant engaged was the maintenance of a small showcase at the entrance to his office on E Street, which contained samples of

bridgework and teeth made by the appellant. The court made no finding in regard to these facts. The same considerations mentioned above, regarding advertisement of prices and maintenance of signs, apply to the sample display. The prohibition of such display accomplishes no aid to public health, safety or any other general public interest.

(d) Free Dental Examination.

The advertisement of free dental examination tends to promote public health and safety. Individuals in low income groups are known to be lax in providing themselves with dental care. Dental deterioration with resultant health impairment frequently occurs without being known. Such persons ordinarily do not consult a dentist until forced to do so because of pain or illness. Such consultations are frequently untimely and the damage cannot be repaired. The only precaution against this common frailty is periodic examination to determine whether treatment is necessary to prevent damage. To follow this procedure education of the public is necessary. All dentists will agree with this. No better means exists for the support of such an educational program than to bring this to the attention of the uneducated or listless members of the community. Education alone may not accomplish the desired public interest unless actual examination is made. To the many whose economic position is such that consultation with a dentist for one or more members of a family would be an undue financial burden, with the result that education along the foregoing lines is wasted, the opportunity for free dental examination crystallizes the good to be obtained by such education.

If a dentist is qualified by training and experience to be the holder of a license to practice, and the appellant was found by the trial court to fall within that class, there can be no question as to where the public interest lies on the present inquiry.

(e) A Regulatory Statute Prohibiting Truthful Advertising is Unconstitutional.

It is admitted that Congress may regulate the practice of dentistry in the District of Columbia. To this end Congress may prescribe the qualifications that are reasonably necessary for the practice of dentistry and may require licenses and establish supervision over such practice by an administrative body.

Douglas v. Noble, 261 U. S. 165, 67 L. Ed. 590.

Graves v. Minnesota, 272 U. S. 425, 71 L. Ed. 331.

The legislature may prohibit misleading advertising which tends to adversely affect the public interest.

Dr. Bloom Dentist v. Cruise, 259 N. Y. 358, 182 N. E. 161, appeal dismissed, 288 U. S. 588, 77 L. Ed. 967.

The case at bar presents a question different from that involved in the *Dr. Bloom Dentist* case, *supra*. There the legislation dealt with deceptive and misleading advertising. There the legislation did not pretend to prohibit truthful and honest advertising. Here, the prohibition is against advertising one's name, one's address, etc., matters clearly without the realm of possible deception. The question here is whether a dentist may truthfully advertise his name, his prices, his address and that he offers free examination to those who seek examination. There is no dispute of fact here in regard to what the appellant seeks to do. Insofar as the statute prohibits honest advertising, it is submitted that it is violative of the due process clause and is unconstitutional.

The case of *Semler v. Oregon State Board of Dental Examiners*, 294 U. S. 608, 79 L. Ed. 1086, relied upon by the appellees in the court below, is not decisive of the question presented to this court. There the state court had defined the policy of the statute which was binding in the State of Oregon and binding upon the Federal Courts. The state court there announced that the policy of the State of Oregon was

that even truthful advertising tended "to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them." There the advertising dealt with representations of "painless dentistry," "professional superiority," "guaranteed dental work," in addition to "free examinations." Such claims of painless dentistry, superiority and guaranty do tend to approach the activities of the quack and charlatan. The question here presented is different in that none of the advertising, either by signs or in newspapers, in which the appellant has engaged, has any semblance of deception or dishonesty. This case, therefore, is distinguishable from the *Semler* case in its very foundation and background. The question before this court is whether or not it is the policy of the District of Columbia to prohibit honest and truthful advertising. Deceptive advertising bears a direct relation to public health and safety with an adverse effect thereon. Honest advertising also bears a direct relation to such interests, but the relation is one which supports and reinforces such interests.

If the statute were regulatory rather than prohibitive, its validity could not be questioned. In the case at bar, regulation of advertising by statute would be entirely proper if such regulation prevented only the deceptive type of advertising, even if an administrative body were empowered to determine what was deceptive and what was truthful. However, prohibition of all advertising does not bear a reasonable relation to the ends to be achieved. It is an established principle that a statutory prohibition is unconstitutional if regulation will accomplish the intended purpose.

Weaver v. Palmer Bros. Co., 270 U. S. 402, 70 L. Ed. 654.

Thus, a statute making it a misdemeanor for any person to act as a railway passenger conductor without having had two years' experience as a freight conductor has been held to be unconstitutional.

Smith v. Texas, 233 U. S. 630, 58 L. Ed. 1129.

On cross-examination of the appellant, he testified that in his advertisements he stated that "modern pain-reducing methods" were used by him. Appellees contended that this was violative of the last clause of Section 11 (d), which prohibited advertising that any dental operation would be performed painlessly. The appellant did not testify that he held himself out as a "painless" dentist but that he used pain-reducing methods which consisted of the use of anaesthetics.

In *Green v. Blanchard*, 138 Ark. 137, 211 S. W. 375, a statute prohibited a dentist from advertising that he could "practice dentistry or dental surgery without causing pain." The court held that the language in the advertisement published by the dentist in which he advertised that he "absolutely minimized pain from dental work," did not mean that he practiced dentistry or dental surgery without causing pain, but that he reduced the pain so as to make it as little or slight as it was possible to do in the practice of dentistry.

II.

The Prohibitions Contained in the Act of July 2, 1940 Violate the Due Process Clause of the Fifth Amendment Because of Vagueness and Indefiniteness.

Section 11 (h) (3) of the Act of July 2, 1940, states that the following constitutes "unprofessional conduct," the penalty for which is revocation of a dentists's license to practice and possible criminal prosecution:

"(3) Advertising by any medium other than the carrying or publishing of a modest professional card or the display of a modest window or street sign at the licensee's office, which professional card or window or street sign shall display only the name, address, profession, office hours, telephone connections, and, if his practice is so limited, his specialty:

Provided, That in case of announcement of change of address or the starting of practice, the usual size card of announcement may be used. The size of said cards or signs shall be designated by the Board."

This section is vague and uncertain in that the meaning of the word "*modest*" is so indefinite that compliance therewith is virtually impossible without some predetermination of its meaning and significance. Congress did not declare the meaning of the word "*modest*," but provided in the last sentence of the subsection that the size of cards or signs shall be designated by the Board.

The objection to the use of the word "*modest*" on the ground of vagueness and indefiniteness is equally applicable to Section 11 (d) in its prohibition of the use of "*large display*" and "*glaring light*" signs.

The invalidity of the statute due to such vague and indefinite terminology is predicated upon the uncertain determination of the limits of lawful and permitted conduct. Although the meaning of the word "*modest*" in Section 11 (h) (3) may be left for determination by the Board, there is no provision for a determination of the meaning of the word "*large*" or "*glaring*" in Section 11 (d), except by construing the last sentence of Section 11 (h) (3) to apply to Section 11 (d). However, the language of the last sentence of Section 11 (d) (3) would indicate that it is limited to that paragraph. No determination exists, therefore, for the meaning of the words "*large*" and "*glaring*" in Section 11 (d).

It has heretofore been held that where a statute controlling advertising is too vague and uncertain, such statute is not enforceable and is invalid.

In *Chenoweth v. State Medical Examiners*, 57 Colo. 74, 141 P. 132, it was held that a statute was too vague and indefinite where it provided for the revocation of a physician's license if he published or circulated any advertising "relative to any disease of the sexual organs." The court there said:

"In the statute under consideration, the mere publication of the advertisement, regardless of its tendency, is sufficient to authorize the revocation of the license; and it must be presumed that the action of the board was based solely upon the fact of the publication, as it

was authorized to do by the language of the statute. Under this statute, then, no matter how harmless or innocent may be the publication, nor what may be the chasteness of its language, nor the utter absence of any tendency to injure the morals of the public, yet the very fact of the publication of the advertisement is sufficient to take from a physician his license and the right to practice his profession * * * The plaintiff in error contends * * * that the term 'relating to a disease of the sexual organs' as used in the statute is so indefinite and uncertain as to make the statute inoperative and invalid for that reason * * * Clearly, the statute is so indefinite as to render it invalid for that reason alone."

In *Hewitt v. State Medical Examiners*, 148 Calif. 590, 84 P. 39, it was held that a statute prohibiting physicians from "advertising of medical business in which grossly improbable statements are made", under a penalty of revocation of license to practice, was too vague and indefinite to be enforceable. The court held the statute to be void and said, as follows:

"It is insisted by petitioner that this particular provision of the act is unreasonable, uncertain, and indefinite; that neither the act itself, nor the law, defines what shall be deemed 'grossly improbable statements;' that the provision in question leaves it entirely to the opinion of the persons who at any time may constitute the board to determine whether a given statement is 'grossly improbable,' and confers authority upon such board to create an offense under the act and inflict punishment for its commission; and that for all these reasons this particular provision of the act in question is void. We think this position of the petitioner must be sustained. * * *

"The right which a person possesses under the Constitution and the laws to practise his profession as a physician and surgeon cannot be made to depend upon a provision of a statute as vague, uncertain, and indefinite as is the provision we have been considering. If a physician's license is to be revoked for 'grossly improbable statements;' if he is to be thereby deprived of his means of livelihood, of his right to practice a profession which it has taken him years of study and a

large expenditure of money to qualify himself for, on the ground that he had made 'grossly improbable statements' in advertising his medical business,—it is requisite that the statute authorizing such revocation define what shall constitute such statements, so that the physician may know in advance the penalty he incurs in making them."

For these reasons, the use of the word "*modest*" in Section 11 (h) (3) and in Regulation No. 7, and the use of the words "*large display*" and "*glaring lights*" in Section 11 (d) render such sections of the Act void and unenforceable.

III.

The Regulations Promulgated by the Board Are Invalid.

(a) The Board was without authority to provide that only two signs could be displayed or that only one newspaper advertisement could be published.

The last sentence of Section 11 (h) (3) of the Act provides:

"The size of said cards or signs shall be designated by the Board."

In Regulation No. 1, paragraphs (a) and (b) and in Regulation No. 7, the Board has provided a limit as to size. However, in Regulations No. 1, No. 2 and No. 7, the Board went beyond the delegation of authority contained in Section 11 (h) (3) and provided also for the *number* of signs which might be displayed. Regulation No. 1 limits the number of signs to two; No. 2 provides that each surface of a sign shall constitute a separate sign; and No. 7 provides that not more than one card may be published in any newspaper or publication at one time.

Even if it be assumed that the delegation of power to the Board was proper, the exercise of power by the Board extended beyond the limits of the authority granted and is, therefore, invalid.

(b) The sizes of signs and advertisements prescribed in the Regulations are not reasonable.

As hereinbefore stated, the court found that appellant's office is located in an area of heavy traffic, that the size of the letters prescribed by Regulation No. 1 could be seen from the street and that the limitation of signs to two in number was reasonable. The evidence was substantial to the effect that signs of the size prescribed would not be readily visible in view of obstructions of traffic and adjacent buildings. The trial court's finding was based on two items of evidence; namely, a view of the scene by the court, and a display in court by the appellees of a sample sign of the prescribed dimensions. No finding was made that the size of the signs on appellant's office was unreasonable. Nor was any view made of appellant's office with the prescribed signs thereon. It is submitted that two signs of the prescribed size placed on the outside facade of appellant's office building, one on the Seventh Street side and one on the E Street side, would be clearly unreasonable in the light of existing physical conditions. The regulations make no distinction between the locality in which a dentist's office is located, the size of the building, or the nature of obstructions to the view thereof. The size as fixed in the regulations is, therefore, arbitrary and not reasonably related to the needs of a particular case. Nor is there, as heretofore submitted, any relation between the size of signs and the general public health. No elasticity or discretion is provided for in the regulations. A different situation would exist if it were provided therein that the size of signs shall be subject to the approval of the Board after examination of the physical location of the office.

Newspaper advertising is permitted by Regulation No. 7. The size of such ads is limited to a maximum length of one inch and a maximum width of two and one-fourth inches. It is submitted that this limitation in size is unreasonable and arbitrary and that no semblance of relationship to public health or safety can be inferred therefrom as against an ad twice the prescribed size.

CONCLUSION.

For the foregoing reasons and authorities cited, it is respectfully submitted that paragraphs (d) and (h) of Section 11 of the Act of July 2, 1940, are unconstitutional and that the regulations promulgated by the Board of Dental Examiners, D. C., pursuant to said Act are void. It is, therefore, urged that the judgment appealed from should be reversed and the case remanded with instructions to the trial court.

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APPENDIX

INDEX TO APPENDIX.

	Page
Complaint	1
Exhibit "A"	9
Answer	11
Order	14
Findings of Fact and Conclusions of Law	14
Conclusions of Law	15
Order	16

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 8076.

SAMUEL B. JOHNSTON, *Appellant*,

v.

BOARD OF DENTAL EXAMINERS, D. C., *et al.*,
Appellees.

Appeal from the District Court of the United States
for the District of Columbia.

APPENDIX TO BRIEF FOR APPELLANT.

I.

PLEADINGS, DOCKET ENTRIES AND OTHER
PAPERS DESIGNATED BY APPELLANT.

1

Complaint

(For Declaratory Judgment, Injunction, etc.)

1. The claim for relief on behalf of the plaintiff, Samuel B. Johnston, against the defendants, Board of Dental Examiners, D. C., and E. Milburn Colvin, Jr., Harold B. Hertford, Vernon J. Lohr, Charles T. Bassett, Martin A. Stohlman, members constituting the said Board of Dental

Examiners, D. C., is within the jurisdiction of this court and is based upon the Federal Declaratory Judgment Act (28 U. S. C. A. Sec. 400, Judicial Code, Section 274(d), as amended), and seeks injunctive relief against the enforcement by the defendants of certain regulations promulgated by it under the alleged authority granted to the defendants by the Act of July 2, 1940, Public No. 708, 76th Congress and to determine the constitutionality of certain portions of said Act of July 2, 1940.

2 2. The plaintiff, Samuel B. Johnston, is a citizen of the United States and a resident of the District of Columbia. He is now and has been for the past 29 years engaged in the practice of dentistry in the District of Columbia. He was graduated from the University of Maryland College of Dentistry and was thereafter duly licensed to practice as a dentist in the District of Columbia and has since continually engaged in active practice of dentistry in the District of Columbia for the period aforesaid.

3. The defendant, Board of Dental Examiners, D. C., is an administrative board of dentists, five in number, created by Act of Congress (June 6, 1892, 27 Stat. 42, c. 89; as amended June 7, 1924, 43 Stat. 599, c. 315; as amended July 2, 1940, Public No. 708, 76th Congress) appointed by the Commissioners of the District of Columbia for a term of five years. The individual defendants, E. Milburn Colvin, Jr., Harold B. Hertford, Vernon J. Lohr, Charles T. Bassett and Martin A. Stohlman, are all citizens of the United States and dentists practicing in the District of Columbia and are the persons appointed by the Commissioners of the District of Columbia to the said Board of Dental Examiners, D. C. and they are all the persons constituting said Board. By virtue of Section 2 of the Act of July 2, 1940 the said Board of Dental Examiners, D. C. is empowered to "make and adopt such rules and regulations not inconsistent herewith as it deems necessary to effect the purposes of this Act." Each of the five members constituting said Board are members of the Dental Society of the District of Columbia and appointed therefrom. The membership of

said society consists of approximately two-thirds of the licensed practicing dentists of the District of Columbia. The Plaintiff is not a member of said society, although duly licensed to practice and actually engaged in the lawful practice of dentistry in the District of Columbia, as aforesaid.

3 4. The plaintiff has been, during his entire period of practice of dentistry in the District of Columbia, and still is, a competent dentist, engaged in said practice honestly, with integrity and with all the scientific knowledge necessary to the proper and efficient performance of the duties of a general practitioner of dentistry. Said plaintiff has a substantial investment of about \$5,000 in modern and scientific equipment, both in his office and laboratory, which is necessary to his practice and which is used by him in his practice of dentistry. During the whole period of plaintiff's practice of dentistry in the District of Columbia he has advertised in the local newspapers and has expended a sum in excess of \$100,000 for such advertising and as a result of such advertising he has been able to render efficient, proper and scientific dental care to many thousands of persons in the low income groups, at low cost who could not have been provided with vitally necessary dental care needed by them for their general health and comfort by the so-called non-advertising dentists in the District of Columbia whose price standards are higher and far beyond the reach of many thousands of local residents in the low income groups, particularly those with large families. By virtue of said newspaper advertising plaintiff's clientele has continuously remained large and as a result of such volume of work he has been able to operate his office more economically and thereby has been able to pass on such economic benefits to the general public, without impairment of a high standard of modern scientific practice. In addition to said newspaper advertising plaintiff has for many years had four painted signs, the dimensions of each being about 4 feet by 6 feet in size, upon the outside walls of the premises where his office is located together with a small

show case in front of said premises containing samples of the laboratory dental work performed by said plaintiff, all of which continued in said manner until the time herein-after mentioned.

4 5. Plaintiff says that section 11 of the Act of July 2, 1940 and the regulations adopted by the defendant, Board of Dental Examiners, D. C., in furtherance of paragraph (h), subdivision (3) of said section, are unconstitutional and void, insofar as said section and regulations provide, under threat of a revocation of plaintiff's license to practice dentistry and his possible criminal prosecution, that if plaintiff engages in any of the following activities, in which he has engaged up to the time of their promulgation and which is necessary to continue in the future for his benefit and the benefit of the general public, that he will be guilty of unprofessional conduct and thereby subject to revocation of his license and possible criminal prosecution:

(a) Advertise the price for certain types of dental work in local newspapers.

(b) Advertise in the local newspapers showing plaintiff's name, address, telephone number, office hours and profession.

(c) Advertise in the local newspapers that plaintiff will examine a patient without charge for such examination.

(d) Maintain four painted signs on the outside of plaintiff's office premises stating his name, address, profession, telephone number and office hours, each of said signs, as heretofore, to be 4 feet by 6 feet in size, and without lights as part of said signs.

6. Insofar as the Act of July 2, 1940 and the regulations thereunder promulgated and adopted by the Board of Dental Examiners, D.C. prohibit the plaintiff from doing any of the acts designated in subparagraphs (a), (b), (c) and (d) of paragraph 5 hereinabove set forth, said Act and regulations are unconstitutional and void in that they are repugnant to the due process clause of the Fifth Amendment of the Constitution and deny to the plaintiff the equal

protection of the laws and constitute an unconstitutional impairment of his contract obligations.

5 Section 11, paragraph (h) of the said Act of July 2, 1940 provides as follows:

“(h) That such holder is guilty of unprofessional conduct.

(1) Practicing while his license is suspended.

(2) Willfully deceiving or attempting to deceive the Board or their agents with reference to any matter under investigation by the Board.

(3) Advertising by any medium other than the carrying or publishing of a modest professional card or the display of a modest window or street sign at the licensee's office, which professional card or window or street sign shall display only the name, address, profession, office hours, telephone connections, and, if his practice is so limited, his specialty: *Provided*, That in case of announcement of change of address or the starting of practice, the usual size card of announcement may be used. The size of said cards or signs shall be designated by the Board.”

A copy of the regulations promulgated and adopted by the Board of Dental Examiners, D. C. pursuant to subdivision 3 of said section 11, paragraph (h), is attached hereto as exhibit A.

7. Plaintiff says that the provisions of section 11 of the Act of July 2, 1940 and the aforesaid regulations promulgated thereunder are not reasonable and appropriate in relation to the protection of the public health, but are indefinite, arbitrary and capricious and designed to set up a standard of conduct for the pecuniary advantage of certain individuals engaged in the practice of dentistry to the exclusion of others on grounds having no reasonable relation to the general public interests involved.

8. Plaintiff further says that section 11(h)(3) of the Act of July 2, 1940 permits “the display of a modest window or street sign at the licensee's office . . . The size of said . . .

signs shall be designated by the Board." The number of such signs is not limited by the Act. The regulations promulgated by the Board of Dental Examiners, D. C. limits such signs to two in number. (See exhibit A, Regulation No. 1.) Said regulation likewise limits the square area of signs parallel and flush to the building to an area of 288

square inches and no more than 48 inches in length with letters no more than 3 inches in height, As to suspended signs not flush or parallel to the building the size is limited to an area of 144 square inches and no more than 24 inches in length, with letters no more than 3 inches in height. Plaintiff says that his office is located in a thickly populated part of the city on the upper floor of a building located at the corner of 7th and E Streets Northwest and adjacent to large buildings located at said place; that traffic at said place is heavy during all working hours, including street cars, busses and other vehicular traffic. The posting of signs of maximum size prescribed by the Board of Dental Examiners, D. C. would be ineffective and serve no purpose whatever, since the many fixed and moving obstructions to visibility in the vicinity are markedly different from conditions prevalent in other parts of the city, where signs of the maximum prescribed size may be adequate to give fair notice to persons near the premises as to the location of said office. Plaintiff says that limitations contained in said regulations are arbitrary, capricious and without any reasonable relation to the general public health.

9. Paragraph 7 of said regulations permits newspaper advertising by dentists. The public health is thereby recognized as not subject to impairment by newspaper advertising per se. The limitation of such advertisements to space not to exceed 2¼ inches in width and one inch in height is arbitrary and capricious and bears no reasonable relation to the general public health.

10. Plaintiff says that prior to the enactment and promulgation of said Act and regulations his gross income averaged more than \$30,000 per year; that since said Act

and regulations his gross income has decreased to about 50% of his former income; that he had contract obligations with newspapers which were created prior to said Act and which have not yet expired which provide him with favorable advertising rates, which he will lose unless permitted to carry out the terms of his said contracts; that the advertising he has done and the signs he has heretofore

7 had affixed to his office premises do not in any manner adversely affect the public health nor impair his ability as a competent and skillful dentist rendering an efficient and scientific public service; that if he carries out his desire to continue newspaper advertising and affixes the signs of the character heretofore used by him as set forth in paragraph 5 herein he will be subjected to possible loss of his license to practice or criminal prosecution or both, with a resultant loss of his source of livelihood.

11. Plaintiff says that his substantial property rights have been impaired by the said Act and regulations and that an actual controversy exists as to plaintiff's right to advertise in the manner as set forth in paragraph 5 herein in view of the said Act and regulations.

Wherefore plaintiff prays judgment against the defendants for the following relief by declaratory judgment and by injunction to be issued out of this Honorable Court:

A. That this Honorable Court declare that section 11 of Act of July 2, 1940 and the regulations promulgated thereunder by the defendants on November 18, 1940 to be null and void and that the defendants and each of them be enjoined from the enforcement of any of said provisions.

B. That if this Honorable Court should hold parts of section 11 of the Act of July 2, 1940 to be valid, that the balance be declared to be null and void and that such declaration of nullity or invalidity be made as to the regulations promulgated thereunder relating to newspaper and other forms of advertising and that prior to such final hearing an injunction pendente lite issue directed to each of the defendants enjoining the enforcement of said Act and regulations.

C. That this Honorable Court by declaratory judgment declare and adjudge that plaintiff may lawfully do the following acts:

8 (a) Advertise the price for certain types of dental work in local newspapers.

(b) Advertise in the local newspapers showing plaintiff's name, address, telephone number, office hours and profession.

(c) Advertise in the local newspapers that plaintiff will examine a patient without charge for such examination.

(d) Maintain four painted signs on the outside of plaintiff's office premises stating his name, address, profession, telephone number and office hours, each of said signs, as heretofore, to be 4 feet by 6 feet in size, and without lights as part of said signs.

D. And for such other and further relief as to this Honorable Court may seem meet and just.

SAMUEL B. JOHNSTON.

District of Columbia: ss.

I, Samuel B. Johnston, have read the foregoing complaint and believe the facts therein stated to be true.

SAMUEL B. JOHNSTON.

Subscribed and Sworn to before me this 30th day of December, 1940.

MARGARET MACPHERSON,
Notary Public,

ALVIN L. NEWMYER,
DAVID G. BRESS,
Attorneys for Plaintiff,
Rust Building.

Exhibit "A"

Regulations Adopted by the Board of Dental Examiners
of the District of Columbia

I. In furtherance of Section 11, Paragraph h, Subdivision 3 of the Act of July 2, 1940, Public No. 708, 76th Congress.

1. A licensee may have two, and only two, signs displayed or exposed to the view of the general public on each premises occupied as an office by said licensee, both of which must be

(a) Parallel to, flush with, and entirely circumscribed by the building lines of the building occupied by the licensee. In which event either or both may be in size no more than two hundred and eighty-eight (288) square inches in area, no more than forty-eight (48) inches in length horizontally and contain lettering no more than three (3) inches in height; or

(b) Suspended from, at an angle to, or separate from the building. In which event either or both may be in size no more than one hundred and forty-four (144) square inches in area, no more than twenty-four (24) inches in length, and containing lettering no more than three (3) inches, in height.

Note: Signs erected pursuant to this authority must be in conformity with the Sign Regulations of the District of Columbia.

2. If any sign maintained by a licensee has lettering on more than one face or area, each face or area with lettering shall be counted as a separate sign.

3. Any sign maintained by a licensee may contain only the name of the licensee as appears on his or her current registration card (the use of initials being permitted), and such other information as provided in Section 11, Paragraph h, Subdivision 3. It is further specifically required that the lettering of the last name together with all other names or initials be of the same size on any given sign.

4. No sign may contain vertical lettering; no sign may use intermittent flashing illumination in any manner; and no signs may have directly or indirectly any illuminated border.

5. No object, sign, painting or display other than per-

mitted in 1, 2, and 3 above shall be maintained by any licensee when displayed or exposed to the view of the general public.

6. The word "Sign" as used in these regulations shall include all painting background or material surrounding the lettering artificially created for the purpose of attracting the notice or attention of any person.

7. The licensee may publish a modest professional card in the newspapers or publications of the District of Columbia. This card shall contain only such information as provided in Section 11, Paragraph h, Subdivision 3. The size of this card shall not exceed two and one-fourth inches ($2\frac{1}{4}$ ") in width and one inch (1") in height. No more than one such card may be published in a copy of any newspaper or publication at one time.

II. A written prescription of a duly licensed and practicing dentist, as that term is used in Section 15 of the Act of July 2, 1940, Public No. 708, 76th Congress, shall contain the following elements: (1) the name of the laboratory to which the prescription is addressed; (2) the date on which it is written; (3) a clear description of the work to be done, with or without appropriate diagrams; (4) a clear specification of the character and quality of the materials to be used; (5) the signature of the licensed and practicing dentist.

The foregoing regulations, adopted November 18, 1940, by the Board of Dental Examiners of the District of Columbia, shall be in full force and effect on and after January 1, 1941.

E. MILBURN COLVIN, JR., *President,*

Board of Dental Examiners, D. C.

HAROLD B. HERTFORD, *Secretary-Treasurer,*

Board of Dental Examiners, D. C.

1, 2 and 3. Defendants admit the allegations in paragraphs numbered 1, 2 and 3 of the complaint.

4. Defendants deny that the price standards of the so-called non-advertising dentists in the District of Columbia are higher or are far beyond the reach of residents of low income groups; defendants deny plaintiff's allegation that his alleged expenditure for newspaper advertising in the amount of \$100,000 has enabled him to operate his office more economically or that he has been able, by virtue of newspaper advertising, to pass on such alleged economic benefits to the general public without impairment of a high standard of modern, scientific practice and defendants say that if plaintiff has spent \$100,000 for newspaper advertising that such an expenditure would not of itself enable plaintiff to render efficient or proper or scientific dental care as alleged in the complaint, and on the contrary say that such an expenditure would necessarily have to be borne by the patients whose work is done by plaintiff; defendants are without knowledge or information sufficient to form a belief as to the size of plaintiff's clientele or as to whether his office is more economically operated than those of so-called non-advertising dentists as alleged; defendants admit plaintiff's allegation that for many years he has had four painted signs, the dimensions of each being about four feet by six feet in size, upon the outside wall of the premises where his office is located, together with a small show case in front of the said premises, containing certain samples, but defendants are without knowledge or information sufficient to form a belief as to whether these samples of laboratory dental work were performed by plaintiff; defendants
12 are without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph numbered 4.

5. Defendants say that the allegations in paragraph numbered 5 are conclusions of law which they are not required to answer.

6. Defendants admit the allegation of paragraph 6 setting forth the contents of Section 11, paragraph (h) of the Act of July 2, 1940; defendants admit the accuracy of the copy of the regulations promulgated and adopted by the Board of Dental Examiners, pursuant to subdivision 3, of said section 11, paragraph (h), attached to the complaint as Exhibit "A", with the following qualification: Paragraph 4 should read as follows:

"No sign may contain vertical lettering; no sign may use intermittent or flashing illumination in any manner; and no signs may have directly or indirectly any illuminated border.";

but defendants say that the remaining allegations of paragraph numbered 6 are conclusions of law which they are not required to answer.

7. Defendants say that the allegations in paragraph numbered 7 are conclusions of law which they are not required to answer.

8. Defendants admit the quotations partially set forth in paragraph numbered 8 of the complaint are taken from Section 11, paragraph (h), subsection 3, but for greater particularity refer to the Act itself; defendants admit that plaintiff's office is located in a thickly populated part of the city on the upper floor of a building located at 7th and E Streets, N. W.; defendants are without knowledge or information sufficient to form a belief as to whether the adjacent buildings are large; defendants admit the allegation that traffic is heavy in the said place during working hours and that it includes streetcars and buses and other vehicular traffic but say that similar conditions obtain in most of the downtown area; defendants deny the remaining allegations of paragraph numbered 8.

9. Defendants admit that paragraph 7 of the regulations of the Board of Dental Examiners, D. C. permits newspaper advertising by dentists; defendants deny that the public health is not subject to impairment by newspaper advertising per se if such advertising consists of more than a modest professional card; defendants deny the remaining allegations of paragraph numbered 9.

10. Defendants are without knowledge or information sufficient to form a belief as to the size of plaintiff's gross income prior to the enactment of the Act of July 2, 1940 and promulgation of the regulations thereunder or whether plaintiff's gross income has been decreased thereby as alleged; defendants are without knowledge or information sufficient to form a belief as to the allegations concerning plaintiff's contract obligations with newspapers; defendants deny the remaining allegations of paragraph numbered 10 except the allegation to the effect that if plaintiff carries out his desire to continue newspaper advertising and affixes the signs of the character heretofore used by him, as set forth in paragraph 5 of the complaint, he will be subject to personal loss of his license to practice or criminal prosecution or both, which allegation defendants admit; defendants are without knowledge or information sufficient to form a belief as to the allegation concerning the loss of plaintiff's livelihood.

11. Defendants deny that plaintiff's substantial property rights have been impaired by the said Act and regulations and deny that an actual controversy exists as to plaintiff's right to advertise in the manner set forth in paragraph 5 of the complaint.

Further answering the complaint defendants aver that the complaint is insufficient at law upon the face thereof and fails to set forth facts sufficient to state a cause of action or any ground upon which the relief prayed for shall be granted.

Further answering said complaint defendants aver that the complaint should be dismissed for the following reasons:

1. The complaint fails to state a claim upon which relief can be granted.

2. The Act of July 2, 1940 and Section 11 thereof were duly enacted by the Congress of the United States and signed by the President thereof. The said Act and section thereof are entitled to every presumption of constitution-

ality until the contrary thereof is clearly shown. The
 14 complaint for injunction fails to set forth facts showing that the Act is unconstitutional.

3. Regulation of the dental profession by Congress in the manner and form set forth in the said Act is a proper exercise of legislative power.

4. The regulations adopted by the said Dental Board pursuant to the authority of the said Act are a reasonable and proper exercise of the regulation-making power authorized by Congress.

WHEREFORE defendants having fully answered the complaint, they respectfully pray that the complaint for injunction pendente lite and final be dismissed.

* * * * *

15

Order

Upon consideration of the Motion to Dismiss filed by the defendants herein, it is by the Court this 19th day of May, 1941,

ORDERED that the defendants' Motion to Dismiss be and the same is hereby overruled, and it is further

ORDERED that the above cause be advanced for trial.

JENNINGS BAILEY

Justice

* * * * *

51 *Findings of Fact and Conclusions of Law*

The Court finds as facts the following:

1. Plaintiff is and has been a licensed dentist in the District of Columbia for twenty-five years; he is reasonably competent; he has advertised for twenty-five years in newspapers, in which he has spent \$2,500 to \$6,000 a year, and by placing for many years four signs, 4 feet by 6 feet in size, and on which there is lettering 4, 5 and 8 inches in size, on his building, as well as by displaying a large metal sign hung at an angle, designed for illumination but no longer illuminated.

2. Plaintiff waits on fifty to sixty patients a day; he estimates that half of them come in because of seeing the newspaper advertisement stating; "Free examination—no charge;" about twelve to fifteen patients a day come in because of the advertisement offering to make a dental plate for \$27.50. Some of the patients are attracted by the signs on the building and by recommendations of other patients.

3. Plaintiff's office is located at 7th and E Streets, N. W., on the southeast corner thereof on the second floor. Heavy traffic passes on both 7th Street and on E Street. Traffic consists of both buses and street cars, as well as heavy automobile traffic.

4. The size of letters fixed by the Board of Dental
52 Examiners are readily visible from the street and the signs sufficient in number. So also the regulations of the Board of Dental Examiners as to advertisements are reasonable.

5. Plaintiff has failed to overcome the presumption that the regulations adopted by the Board of Dental Examiners of the District of Columbia are reasonable and proper and are within the scope of authority delegated to the Board of Dental Examiners.

Conclusions of Law

The Court finds as a matter of law:

1. That the Act of Congress, designated The Dental Act, of the 76th Congress, 3rd Session (Public No. 708), is clearly constitutional;

2. The regulations adopted by the Board of Dental Examiners are within the scope of authority delegated to them by the aforementioned Act;

3. The question of the size of signs and the number thereof, as well as the question of the size of advertisements permitted to be inserted in daily newspapers, is primarily a question for the Board of Dental Examiners, unless their decision is clearly erroneous;

4. The regulations of the Board of Dental Examiners are reasonable, valid and enforceable.

JENNINGS BAILEY,
Justice.

Order

This action came on to be heard at this term; and there upon, upon consideration thereof, it is this 15th day of July, 1941

ADJUDGED, That the complaint be and the same hereby is dismissed.

JENNINGS BAILEY,
Justice.

UNITED STATES
DISTRICT COURT OF THE DISTRICT OF COLUMBIA
1942
BRIEF FOR APPELLEES *Joseph M. Johnston*

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

No. 8076

SAMUEL B. JOHNSTON, *Appellant,*

vs.

BOARD OF DENTAL EXAMINERS, D. C., et al.,
Appellees.

RICHMOND B. KEECH,
Corporation Counsel, D. C.,
VERNON E. WEST,
Principal Assistant Corporation Counsel, D. C.,
Attorneys for Appellees,
District Building.

INDEX

SUBJECT INDEX

	PAGE
Summary of Argument	1
Argument	
I. Paragraph (d) of Section 11 of the District of Columbia	
Dental Act of 1940 is constitutional	2
(a) Constitutionality of Act in General	2
(b) Prices	5
(c) Building Signs	6
(d) Display of Bridge Work	7
(e) Free Dental Examination	7
(f) Truthful Advertising	7
II. The prohibitions contained in the Dental Act are neither	
vague nor indefinite	9
III. The regulations promulgated by the Board are valid	11
Conclusion	16

CASES CITED

<i>Armstrong v. Nu-Enamel Corp.</i> , 305 U. S. 315	12
<i>Borden's Farm Products Co. v. Baldwin</i> , 293 U. S. 194	5
<i>Commonwealth v. Brown</i> , 302 Mass. 523, 20 N. E. 2d 478	8
<i>Craven v. Bierring</i> , 222 Iowa 613, 269 N. W. 801	6, 9
<i>District of Columbia v. Dewalt</i> , 31 App. D. C. 327	13
<i>Dr. Bloom Dentist Inc. v. Cruise</i> , 259 N. Y. 358, 182 N. E. 16	7
<i>Euclid v. Ambler Realty Co.</i> , 272 U. S. 365	15
<i>Goe v. Gifford</i> , 168 Va. 497, 191 S. E. 783	5, 6, 8
<i>Graves v. Minnesota</i> , 272 U. S. 425	7
<i>Gullings v. State Bd. of Dental Examiners</i> , 200 Minn. 115, 273 N. W. 703	7
<i>Hagger Co. v. Helvering</i> , 308 U. S. 389	12
<i>Heald v. District of Columbia</i> , 259 U. S. 114	9
<i>Kay v. United States</i> , 303 U. S. 1	11
<i>Laughney v. Mayberry</i> , 145 Wash. 146, 259 Pac. 17	8
<i>Levine v. State Bd. of Registration</i> , 121 N. J. L. 193, 1 Atl. 2d 876	6, 9
<i>Modern System Dentists v. State Bd. of Dental Examiners</i> , 216	
Wis. 190, 256 N. W. 922	6
<i>Pacific States Co. v. White</i> , 296 U. S. 176	5
<i>Packer Corp. v. Utah</i> , 285 U. S. 105	8
<i>Premier-Pabst Co. v. Grosscup</i> , 298 U. S. 226	9
<i>Purity Extract Co. v. Lynch</i> , 226 U. S. 192	15
<i>Rust v. Missouri Dental Board</i> , (Mo.) 155 S. W. 2d 80	9
<i>Semler v. Oregon Bd. of Dental Examiners</i> , 294 U. S. 608	2, 8
<i>Sherman v. State Bd. of Dental Examiners</i> , (Tex. Civ. App.) 116 S. W.	
2d 843	6, 9
<i>Winberry v. Hallihan</i> , 361 Ill. 121, 197 N. E. 552	6, 8

STATUTES CITED

Act of Congress of July 2, 1940, 54 Stat. 716, Sections 2-301-331, D. C. Code, 1940 Ed.	2
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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

No. 8076

SAMUEL B. JOHNSTON, *Appellant*,

vs.

BOARD OF DENTAL EXAMINERS, D. C., et al.,
Appellees.

BRIEF FOR APPELLEES

SUMMARY OF ARGUMENT

Paragraph (d) of Section 11 of the District of Columbia Dental Act of 1940 is copied almost verbatim from the Oregon Dental Law of 1933, the constitutionality of which was sustained by the Supreme Court of the United States in the case of *Semler v. Oregon State Board of Dental Examiners*, 294 U. S. 608.

Advertising by members of the learned professions, of which dentistry is one, may be absolutely prohibited, since advertising results in unethical competition. Therefore, it follows there can be no constitutional objection to a statute prohibiting dentists from

advertising prices, from using large display signs or displaying bridge work, or from advertising free dental examinations. It is immaterial whether the advertising be true or false.

The words "large display", "glaring light", and "modest", as applied to signs, are not vague nor indefinite when construed in the light of the ethics of the profession, but it is not important whether these words are definite or indefinite since the statute provides that the size of the signs shall be designated by the Board. This the Board has done.

The power vested in the Board to designate the size of cards and signs necessarily includes the authority to designate the number thereof, as otherwise the limitation as to size would be a nullity. The word "size" must be construed to mean "aggregate size".

The regulations of the Board are reasonable and were so found to be by the court below.

ARGUMENT

I

Paragraph (d) of Section 11 of the District of Columbia Dental Act of 1940 is constitutional.

(a) Constitutionality of Act in General.

Paragraph (d) of Section 11 of the District of Columbia Dental Act, approved July 2, 1940, 54 Stat. 716, 718, (Sec. 2-311, D. C. Code, 1940 Ed.) is copied almost verbatim from the Oregon dental law of 1933, the only difference between the two being in the clause relating to solicitors and publicity agents which is not material here, as appellant does not make use of solicitors or press agents. The constitutionality of the Oregon law was attacked in the case of *Semler v. Oregon State Board of Dental Examiners*, 294 U. S. 608, by a dentist who

was engaged in practices strikingly similar to those followed by the appellant here. Referring to the allegations of the complaint in that case, the Supreme Court said:

"Plaintiff alleged in his complaint that he was licensed in 1918; that he had continuously advertised his practice in newspapers and periodicals, and by means of signs of the sort described in the amended statute, and that he had employed advertising solicitors; that in his advertisements he had represented that he had a high degree of efficiency and was able to perform his professional services in a superior manner; that he had stated the prices he would charge, had offered examination of prospective patients without charge, and had also represented that he guaranteed all his dental work and that his dental operations were performed painlessly. He further alleged that the statements in his advertisements were truthful and were made in good faith; that by these methods he had developed a large and lucrative practice; that through long training and experience he had acquired ability superior to that of the great majority of practicing dentists; that he had been able to standardize office operations, to purchase supplies in large quantities and at relatively low prices, and thus to establish a uniform schedule of charges for the majority of operations; also that he had made contracts for display signs and for advertisements in newspapers, and had entered into other engagements, of which he would be unable to take advantage if the legislation in question were sustained, and, in that event, his business would be destroyed or materially impaired."

The court sustained the validity of the statute, saying:

"The state court defined the policy of the statute. The court said that while, in itself, there was nothing harmful in merely advertising prices for dental work or in displaying glaring signs illustrating teeth

and bridge work, it could not be doubted that practitioners who were not willing to abide by the ethics of their profession often resorted to such advertising methods 'to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them.' The legislature was aiming at 'bait advertising.' 'Inducing patronage,' said the court, 'by representations of "painless dentistry," "professional superiority," "free examinations," and "guaranteed" dental work' was, as a general rule, 'the practice of the charlatan and the quack to entice the public.'

"We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards."

It is plain that appellant relies upon the force of his advertising to secure a large proportion of his patients, instead of relying upon a reputation for professional honesty, integrity, skill and ability. He has placed upon his building four signs, 4 feet by 6 feet in size, on which there is lettering 4, 5 and 8 inches in size, as well as a large metal sign hung at an angle, designed for illumination, but no longer illuminated.

He also spends from \$2500 to \$6000 a year for newspaper advertising. (Finding of Fact No. 1, Appellant's Appendix p. 14) Appellant further testified that he quit advertising for about 6 months and his business fell off 50 per cent. (Stenographic Transcript, p. 17.) These facts demonstrate that advertising, as said in the *Semler* case, is a practice "which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous."

(b) Prices.

Appellant contends that the advertising by dentists of the prices at which they do their work is of benefit to the public and, therefore, cannot be prohibited, and that the trial court could not dismiss the complaint without first making a finding of fact that the advertising of prices by appellant is contrary to the public health or the public interest. But the question is one primarily for the legislature and not for the court. It is the duty of the court to sustain a statute passed under the police power "if any state of facts reasonably can be conceived that would sustain it." *Pacific States Co. v. White*, 296 U. S. 176, 184, *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 209. The courts recognize that the advertising of prices for dental work may be detrimental to the public, and it is for the legislature and not for the courts to say whether the evils arising therefrom outweigh the good. In the *Semler* case, the Supreme Court sustained the validity of the statute as against one who advertised prices.

There is nothing novel nor unusual in a statute regulating advertising by dentists. In the case of *Goe v. Gifford*, 168 Va. 497, 191 S. E. 783, which was decided in 1937, it is stated that thirty states prohibit the advertising of prices; twenty-eight prohibit the advertising of display signs carrying cuts or illustrations of teeth; twenty-one prohibit the advertising of free dental services, and nineteen outlaw the advertising of guar-

anteed dental work, and that in the great majority of cases the statutes have been upheld. The following state cases hold that the advertising of prices for dental work may be prohibited:

Goe v. Gifford, supra,
Winberry v. Hallihan, 361 Ill. 121, 197 N. E. 552,
Sherman v. State Board of Dental Examiners, (Tex.
 Civ. App.) 116 S. W. 2d 843,
Levine v. State Board of Registration, 121 N. J. L.
 193, 1 Atl. 2d 876,
Craven v. Bierring, 222 Iowa 613, 269 N. W. 801,
*Modern System Dentists v. State Board of Dental
 Examiners*, 216 Wis. 190, 256 N. W. 922,

We have been unable to find any case holding to the contrary.

(c) Building Signs.

Appellant contends that this case should be reversed because the court below did not find that the five signs maintained by appellant upon the outside walls of the building where his office is located were "large display", or "glaring light" signs. Paragraph (d) of Section 11 of the Act must be read in the light of subparagraph 3 of paragraph (h) of the same section. Subparagraph 3 of paragraph (h) prohibits "advertising by any medium other than the carrying or publishing of a modest professional card or the display of a modest window or street sign at the licensee's office" and provides that "the size of said cards or signs shall be designated by the Board." The court below found (Appellant's Appendix p. 14) that four of the signs on appellant's building were each 4 feet by 6 feet in size, on which there is lettering 4, 5 and 8 inches in size, and that the fifth sign was large. It is obvious that such signs are not "modest" and it is conceded by appellant that all the signs are in excess of the size designated by the

Board. The following cases, in addition to the *Semler* case and the state cases cited under the previous heading, sustain the power of the legislature to regulate the size and character of signs to be used by dentists.

Dr. Bloom Dentist, Inc. v. Cruise, 259 N. Y. 358, 182 N. E. 16,
Gullings v. State Board of Dental Examiners, 200 Minn. 115, 273 N. W. 703.

(d) Display of Bridge Work

The display of bridge work is specifically prohibited by paragraph (d) of Section 11 of the Act. The authorities heretofore cited amply sustain the constitutionality of this provision.

(e) Free Dental Examination

Appellant asks this court to rule that the alleged advantages from advertising free dental examinations outweigh the evils resulting therefrom. But this question has been determined by Congress in the negative. The evils resulting from the advertising of free dental examinations are clearly pointed out in the cases heretofore cited and have uniformly been held sufficient to sustain the constitutionality of the legislation. Congress having the power to prohibit advertisements of this character, the question of the desirability of such legislation is for Congress alone and not for the courts.

(f) Truthful Advertising

Appellant contends that a prohibition of honest and truthful advertising is violative of the due process clause of the Constitution. We are here dealing with advertising by members of one of the learned professions (*Graves v. Minnesota*,

272 U. S. 425) and not with the advertising of "traders in commodities". But even truthful advertising of certain commodities may be prohibited. (See *Packer Corp v. Utah*, 285 U. S. 105, where a statute prohibiting the advertising of tobacco products on any bill board, street car sign or placard was sustained). Advertising by members of a learned profession may be absolutely prohibited. *Laughney v. Mayberry*, 145 Wash. 146, 259 Pac. 17; *Goe v. Gifford*, *supra*; *Winberry v. Hallihan*, *supra*; *Commonwealth v. Brown*, 302 Mass. 523, 20 N. E. 2d. 478. It follows that, if all advertising may be prohibited, it is immaterial whether appellant's advertising be true or false. In the *Semler* case, *supra*, the court said: (pp. 611, 612)

"Recognizing state power as to such matters, appellant insists that the statute in question goes too far because it prohibits advertising of the described character, although it may be truthful. He contends that the superiority he advertises exists in fact, that by his methods he is able to offer low prices and to render a beneficial public service contributing to the comfort and happiness of a large number of persons.

* * * * *

"It is no answer to say, as regards appellant's claim of right to advertise his 'professional superiority' or his 'performance of professional services in a superior manner,' that he is telling the truth. In framing its policy the legislature was not bound to provide for determinations of the relative proficiency of particular practitioners. The legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule, even though in particular instances there might be no actual deception or misstatement. *Booth v. Illinois*, 184 U. S. 425, 429; *Purity Extract Co. v. Lynch*, 226 U. S. 192, 201; *Hebe*

Co. v. Shaw, 248 U. S. 297, 303; *Pierce Oil Corp. v. Hope*, 248 U. S. 498, 500; *Euclid v. Ambler Realty Co.* 272 U. S. 365, 388, 389."

See also

Sherman v. State Board of Dental Examiners, supra,
Levine v. State Board of Registration, supra,
Craven v. Bierring, supra.

II

The Prohibitions contained in the Dental Act are neither vague nor indefinite.

Appellant contends that the words "large display," "glaring light" and "modest", when applied to signs, are so vague and indefinite as to render the statute unconstitutional. Since appellant does not use an illuminated sign he is not in a position to contest the validity of the statute with respect to the prohibition against such signs.

Premier-Pabst Co. v. Grosscup, 298 U. S. 226,
Heald v. District of Columbia, 259 U. S. 114.

The words "large display" and "glaring light", when considered from the viewpoint of professional ethics, with which appellant is charged with knowledge, are definite. This question was recently before the Supreme Court of Missouri, in the case of *Rust v. Missouri Dental Board*, (Mo.) 155 S. W. 2d 80, when considering a statute which, like ours, prohibited a dentist from advertising by means of "a large display" or "glaring light" sign. The court sustained the statute although its validity was challenged on the ground it was vague and indefinite. The court said:

" * * * The popular meaning of the word 'large' in its context in the statute would be exceeding most

other things of like kind in quantity or dimensions. Webster's New International Dictionary. Therefore, under the formula of the Lentine case, *supra*, 334 Mo. loc. cit. 234, 235, 65 S. W. 2d 943, 950, the expression 'large display' must mean, display advertising exceeding most other of like kind in quantity or dimensions, according to general opinion and common judgment. If the advertising admitted done by appellant was that, then clause (b) is not vague and uncertain as to him.

"We think the evidence shows it was, as we shall later attempt to demonstrate. In addition to that the statute, as already observed, contemplates reserved, circumspect advertising. Further, the part here under construction is not directed against the general public like a criminal statute, but is for the regulation of a profession, whose members ordinarily would know more about its ethical standards than a layman would know about general criminal or regulatory law. So we conclude appellant cannot attack Sec. 10071 because of its use of the word large, regardless of what the conclusion might be in a case on different facts."

It is not material what meaning may be ascribed to the words "large" or "glaring", as subparagraph 3 of paragraph (h) of Section 11 of the Act prohibits any outside advertising except "a modest window or street sign at the licensee's office." The word "modest", when construed in the light of the ethics of the profession, is definite, and it is obvious that the signs used by appellant are far from modest. But Congress did not leave the definition of the word "modest" to the courts but to the Board of Dental Examiners, since it provided in the same subparagraph that "the size of said cards or signs shall be designated by the Board." This the Board has done (Appellant's Appendix pp. 9 and 10). The size of the signs is designated by the Board as to area and length, together with the height of the lettering which may be used. The regulations adopted by the Board pursuant to the statute become a

part of the Act and if there is any ambiguity or uncertainty in the Act itself, it is removed by the regulation.

In the case of *Kay v. United States*, 303 U. S. 1, a statute provided a criminal penalty for one charging or receiving any fee, charge or other consideration from any person applying to the Home Owner's Loan Corporation for a loan "except ordinary fees authorized and required by the Corporation for services actually rendered for examination and perfection of title, appraisal, and like necessary services." The Board of Directors of the Corporation adopted a resolution defining the permitted fees. One convicted of a violation of this Act contended that the words "ordinary charges" lacked the definiteness required under the due process clause. In denying this contention the court said:

"The resolution adopted by the Board of Directors sets forth the nature of the ordinary charges that 'are authorized and required,' and the power of Congress to provide for such action by the Board is not open to question. See *United States v. Grimaud*, 220 U. S. 506, 521; *United States v. Shreveport Grain Co.*, 287 U. S. 77, 85."

III

The regulations promulgated by the Board are valid.

(a) Appellant contends that the Board is without authority to provide that a licensee may not publish more than one professional card in a copy of any newspaper or publication at one time and is also without authority to provide that the licensee may not display more than two signs on his building. Subparagraph 3 of paragraph (h) of Section 11 prohibits "advertising by any medium other than the carrying or publishing of a modest professional card or the display of a modest window or street sign at the licensee's office." It will be noted that the statute permits only "a modest professional

card" or "a modest window or street sign". Therefore if the Board acted without authority in any particular it was in permitting two signs upon the dentist's premises when the statute seems to contemplate only one. But even assuming, for the sake of argument, that the words "a modest professional card" or "a modest window or street sign" can be construed to include the plural, certainly Congress, in requiring the Board to designate the size of the cards and signs, did not intend to do a vain thing. If a dentist could plaster his whole building with signs, or if he could fill a whole page of a newspaper with his business cards, without number, the limitation as to size would be a nullity.

It is well settled that statutes will not be given a literal construction if such a construction would produce an absurd or futile result.

In the case of *Haggar Co. v. Helvering*, 308 U. S. 389, 394, the court construed the words "first return" to include an amended first return, saying:

"All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided, when they can be given a reasonable application consistent with their words and with the legislative purpose. *Hawaii v. Mankicki*, 190 U. S. 197; *United States v. Katz*, 271 U. S. 354; *Sorrells v. United States*, 287 U. S. 435, 446; *Burnet v. Guggenheim*, 288 U. S. 280, 285; *Armstrong Co. v. Nu-Enamel Corp.*, 305 U. S. 315, 332-3."

In the case of *Armstrong v. Nu-Enamel Corp.*, 305 U. S. 315, 333, the court said:

"Where, as here, the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law."

In the case of *District of Columbia v. Dewalt*, 31 App. D. C. 327, one Dewalt was charged in the Police Court with engaging in the practice of veterinary medicine in violation of law. While the Act there in question provided for the making of applications for licenses to practice this profession and the issuance of licenses to persons qualified, and further provided penalties for the violation of the provisions of the statute, nowhere in the Act was one expressly prohibited from engaging in the practice of veterinary medicine without a license. The Police Court dismissed the complaint for that reason. This court held that, in spite of this omission in the statute, a reading of the Act disclosed an intention on the part of Congress to prohibit the practice of this profession without a license, and that the Act should be construed accordingly, saying:

"It was the substance, and not the shadow, with which Congress was dealing. The object of the Act was not to provide idle forms and ceremonies, but to rid the District of quack horse doctors."

If Congress did intend that more than one sign could be permitted or more than one professional card could be inserted in a single edition of a newspaper, then the statute can only be given force and effect by construing the word "size" to mean "aggregate size".

The power of the Board to make regulations is not limited to the power granted in subparagraph 3 of paragraph (h) of Section 11, but additional authority is found in Section 2 (Sec. 2-302 D. C. Code, 1940 Ed.) which provides in part "The Board shall make and adopt such rules and regulations not inconsistent herewith as it deems necessary to effect the purposes of this Act, * * *". Certainly a limitation of the number of signs and the number of professional cards is necessary to effect the purposes of the Act. As before pointed out, if the number of signs and the number of cards is not limited, the purpose of the Act with respect to size is defeated.

(b) Appellant further contends that the size of the signs and advertisements prescribed in the regulations is not reasonable. The court below found to the contrary (Finding of Fact No. 4, Appellant's Appendix p. 15). The only limitations placed by the statute upon the size of the cards and signs to be designated by the Board is that the card must be modest and that the sign must also be modest and not a large display or glaring light one. While the statute defines in general terms the maximum size of the sign and card it does not fix the minimum. It may be that had the Board prescribed signs and cards so small as to amount to none at all the contention might be sustained that the regulations were unreasonable. But that is not the case here. Signs which are flush with the building may be 6 inches high and 4 feet long. If the length is less, the height may be greater, provided the sign does not exceed 288 square inches in area. The lettering thereon may be 3 inches in height. Signs which protrude from the building, either perpendicular thereto or at an angle, may be 6 inches high and 2 feet long. If the length be reduced, the height may be increased, provided the sign is not in excess of 144 square inches. The lettering may be 3 inches in height. The professional business card which may be published may be 2¼ inches in width and 1 inch in height.

Bearing in mind that Congress limited the Board only with respect to the maximum of the sizes of the signs and cards to be permitted, and bearing in mind further that Congress could have prohibited all advertising by dentists, it is submitted that the sizes prescribed are not unreasonable.

Appellant further contends that the regulations of the Board are invalid because they lay down a general rule applicable to all. He argues that there should be a separate regulation for each particular case, taking into consideration the locality of the dentist's office, the size of the building and the nature of the obstructions to the view thereof. Congress plainly intended that the Board designate the size of the signs by a

general regulation and not by the exercise of discretion in each particular case. Even if, which we do not concede, appellant's signs are not harmful because of the various factors upon which he relies, this would not invalidate the regulation.

In the case of *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 389, the court said:

"Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this Court has upheld although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. *Hebe Co. v. Shaw*, 248 U. S. 297, 303; *Pierce Oil Corp. v. City of Hope*, 248 U. S. 498, 500. The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity."

In the case of *Purity Extract Co. v. Lynch*, 226 U. S. 192, 204, the court said:

"The existence of this power, as the authorities we have cited abundantly demonstrate, is not to be denied simply because some innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat."

Since the court below found (Finding of Fact No. 4, Appellant's Appendix p. 15) that "The size of letters fixed by the Board of Dental Examiners are readily visible from the street and the signs sufficient in number", it cannot be said the regulations of the Board are arbitrary. It is, therefore, im-

material whether the Board could, without violating the prohibitions contained in the Act, have permitted signs of the size and number used by appellant.

CONCLUSION

In considering the questions raised in this case the court must consider the purpose and intent of Congress as expressed in Section 10 of the Act (Sec. 2-310, D. C. Code, 1940 Ed.). This section reads as follows:

"Sec. 10. The practice of dentistry in the District of Columbia is hereby declared to affect the public health and safety and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified dentists be permitted to practice dentistry in the District of Columbia. All provisions of this Act relating to the practice of dentistry shall be construed in accordance with this declaration of policy."

For the reasons above given it is respectfully submitted that the Act here under consideration is constitutional and that the regulations promulgated thereunder are reasonable and valid.

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